

REMARKS

No claims have been cancelled or amended, and no new claims have been added. Claims 1-35 are pending.

Disclaimers Relating to Claim Interpretation and Prosecution History Estoppel

The claims of this application are intended to stand on their own and are not to be read in light of the prosecution history of any related or unrelated patent or patent application. Furthermore, no arguments in any prosecution history relate to any claim in this application, except for arguments specifically directed to the claim.

Claim Rejections - 35 USC § 103

The Examiner rejected claims 1-2, 5-12, 15-23, 26-28 and 31-33 under 35 USC § 103 as obvious from Smith et al. (US Patent No. 6,091,802) in view of Averbuj (US Patent Publication No. 20050257109). This rejection is respectfully traversed.

A. THE REFERENCES MAY NOT PROPERLY BE COMBINED

We maintain our prior argument that the teachings of the cited references may not be properly combined.

We reiterate that it is not apparent why a person involved with a telecommunications testing system of Smith would avail himself of the memory testing system of Averbuj. In discussing claim 1, the Examiner asserts that the first three steps of the method are disclosed in Smith, while the last two steps are asserted to be disclosed in Averbuj. However, there is no teaching or suggestion in Averbuj of telecommunications, and there is no teaching or suggestion in Averbuj of network protocols as disclosed and claimed in Smith. As such, there is no tie between the memory testing system of Averbuj and the telecommunications testing system of Smith.

Please consider that a person of ordinary skill in the art having *common sense* at the time of the invention would not have reasonably looked to the Averbuj to solve a problem with network traffic scripts or a test algorithms problem, because Smith did not have any such problems to be solved. It can only be from improper hindsight that the Examiner is attempting to combine Smith and Averbuj. Since Smith already teaches a solution, it is clear that the Examiner has used the claims as a guide or roadmap in formulating the rejection. Accordingly, the rejection should be withdrawn.

B. THE REFERENCES DO NOT DISCLOSE THE CLAIMED LIMITATIONS

As set forth below, the cited references fail to teach or suggest all of the limitations recited in the independent claims. As such, the independent claims are patentable over the cited references. In addition, all of the dependent claims are patentable by virtue of their dependence on patentable independent claims.

1. Averbuj and Smith Fail to Teach the Claimed “Protocol Engine”

Claim 1 recites a “protocol engine”. The Office Action directs us to Averbuj for a teaching of protocol engines. However, the sequencers and test algorithms of Averbuj fail to teach or suggest the protocol engine claimed.

Claim 1 is directed to “a method of creating network traffic”. The term “protocol engine” must be interpreted in view of the “method of creating network traffic” and the specification as a whole. The specification defines “network traffic” as “data units communicated over a network” which support one or more higher level or lower level communications protocols such as UDP, TCP, FTP, ISDN, PPP, FDDI and others. (Specification as published, paras. 0016 and 0026) As such, Averbuj fails to teach or suggest “invoking a protocol engine for each of the commands in the test script such that each protocol engine has an associated command” and “each protocol engine

executing its associated command” as claimed. This is particularly so because Averbuj fails to teach or suggest a “protocol engine” as claimed.

In addition, the Examiner further asserts that the sequencers (element 8) of Averbuj teach claimed “protocol engine”. This cannot be so. Averbuj explicitly states that

Sequencers 8 interpret and execute test algorithms provided by BIST controller 4. In particular, sequencers 8 receive high-level commands from BIST controller 4 that define a complete BIST algorithm.

Averbuj, para. 0030, first 4 lines. All this portion of Averbuj teaches is that a sequence of commands may be included in a test algorithm. As such, there is no teaching or suggestion in Averbuj of communications, and there is no teaching or suggestion in Averbuj of communications protocols like the protocols claimed. Thus, the cited references fail to show a “protocol engine” as claimed.

Further, claim 2 makes it clear that “the command in the test script simulate actions taken by a network user”. The Examiner cites a portion of Smith for this teaching. However, the claimed protocol engine is invoked for each of the commands in the test script. As such, the protocol engine invokes commands that “simulate actions taken by a network user”. But the Examiner states that “Smith does not specifically disclose ‘invoking a protocol engine for each of the commands in the test script such that each protocol engine has an associated command’, and ‘each protocol engine executing its associated command’.” (Final Office Action, bottom of p. 6). Either Smith discloses this functionality or it does. And since the Examiner states that Smith does not disclose the protocol engine, Smith cannot then be cited for disclosing that the script invoked by the protocol engine simulates the actions taken by a network user, as there is no protocol engine disclosed in Smith. Same with Averbuj. As stated above, Averbuj cannot teach this limitation because it does not in any way involve a network or actions taken by a network user. That is, the sequencers of Averbuj are not capable of “simulate actions taken by a network user” or execute the commands from the claimed script.

Moreover, claim 5 makes it clear that “the test script causes network traffic to be produced”. As stated above, Averbuj fails to disclose in any way network traffic. The Examiner asserts that Smith teaches the claimed network traffic that is produced by the sequencers of Averbuj. But this cannot be as the chip testing teachings of Averbuj as they relate to the protocol sequencers have no network communications capabilities whatsoever.

For all these reasons, claims 1, 2 and 5 are patentable over the cited references. The same applies to claims 11, 12 and 15. To the extent applicable, claims 21, 26 and 31 are similarly patentable.

2. Smith and Averbuj Fail To Teach the Claimed “Application Thread”

The independent claims recite an “application thread”. “Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Philips v AWH* 415 F.3d 1314, (Fed. Cir. 2005) (*en banc*) As set forth in the specification, an application thread is not a traditional operating system thread as it is lighter weight such that it requires “a smaller amount of network testing system resources to execute”. (Specification as published, para. 0036) The Office Action directs us to col. 4, lines 61-65 of Smith for the teaching of an application thread. However, there is nothing in Smith that discloses application threads. Smith only discusses “threads of control” that may not exceed the number of available processors. (Smith, 4:61-65) The “threads of control” of Smith do not teach or suggest the claimed application threads. Averbuj fails to disclose an application thread. The Examiner cannot ignore the specification. The patentee may be its own lexicographer. The Federal Circuit Court has concluded that “It is therefore entirely appropriate for a court, when conducting claim construction, to rely heavily on the written description for guidance as to the meaning of the claims.” *Philips v AWH* 415 F.3d 1303, (Fed. Cir. 2005) (*en banc*) The Examiner is similarly bound. Therefore, because the

cited references fails to teach or suggest an “application thread”, the independent claims are patentable over the cited references.

3. Smith and Averbuj Fail to Teach “User Space” and “Operating System Space”.

Claims 21, 26 and 31 recite, among other limitations, “user space” and “operating system space”. However, the cited references fail to make a distinction between or disclose “user space” and “operating system space”. Specifically, claim 21 recites “a plurality of script interpreter units in user space”, “an application thread in user space” and “a plurality of protocol engines in user space”. The Examiner states that Smith’s user test computer 202 discloses “user space”. This is not so. A user computer includes both “user space” and “operating system space”. Importantly, even if *in arguendo* Smith did disclose “user space”, Smith does not disclose “user space” as to the claimed elements. Further, Averbuj similarly fails to disclose that the sequencers (which are asserted to disclose the claimed protocol engines) are in user space. Averbuj is silent as to whether the sequencers are in user space or in operating system space. As such, because Smith and Averbuj fail to disclose the claimed elements in “user space”, claim 21 is patentable over the cited references.

To the extent independent claims 26 and 31 each recite “user space” and “operating system space”, as set forth in the above paragraph regarding claim 21, the combination of Smith and Averbuj fails to teach or suggest all of the claimed limitations. Therefore, claims 21, 26 and 31 are patentable over the cited references. By virtue of their dependence on claims 21, 26 and 31, all claims dependent on claims 21, 26 and 31 are patentable over the cited references.

Conclusion

For the reasons set forth above, all claims are patentable over the combination of references. As such, this rejection should be withdrawn. It is submitted, however, that the independent and dependent claims include other significant and substantial recitations which are not disclosed in the cited references. Thus, the claims are also patentable for additional reasons. However, for economy the additional grounds for patentability are not set forth here.

In view of all of the above, it is respectfully submitted that the present application is now in condition for allowance. Reconsideration and reexamination are respectfully requested and allowance at an early date is solicited.

The Examiner is invited to call the undersigned to answer any questions or to discuss steps necessary for placing the application in condition for allowance.

Respectfully submitted,



Mark A. Goldstein
Reg. No. 50,759

Date: May 12, 2008

SoCal IP Law Group LLP
310 N. Westlake Blvd., Suite 120
Westlake Village, CA 91362
Telephone: 805/230-1350 x240
Facsimile: 805/230-1355
email: mgoldstein@socalip.com